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Supreme Court of the United States

October Term, 1978

No. 78-.....78-1392

JEANNE HARRINGTON,
Petitioner,

vs.

VANDALIA-BUTLER BOARD OF EDUCATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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Supreme Court of the United States

October Term, 1978

No. 78-.....

JEANNE HARRINGTON,
Petitioner,

vs.

VANDALIA-BUTLER BOARD OF EDUCATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

Petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the Sixth Circuit to review the judgment entered in the above entitled case on October 27, 1978, rehearing of which was denied December 11, 1978.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 585 F.2d 192 (1978) and set forth in the Appendix at pp. A10-A21. The order denying rehearing and rehearing *en banc* is as yet unreported; it is set forth in the Appendix at pp. A22-A23. The opinion of the United States District Court for the Southern District of Ohio is reported at 418 F. Supp. 603 (1976) and is set forth in the Appendix at pp. A1-A8.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on October 27, 1978, and a timely filed petition for rehearing with a suggestion for rehearing *en banc* was denied on December 11, 1978.

The jurisdiction of this Court is invoked pursuant to the provisions of Title 28 United States Code § 1254(1).

QUESTIONS PRESENTED

The United States Court of Appeals for the Sixth Circuit held that petitioner, while employed by respondent to teach physical education, was subjected to intentional sex discrimination with respect to her working conditions. Inasmuch as petitioner's employment relationship with respondent had ceased, the district court held, and the court of appeals affirmed, that petitioner was not entitled to an injunction. Further, both courts held that, in light of the nature of the discrimination, back pay was not appropriate. The court of appeals, however, reversed the district court's award of $6,000.00, holding that damages "of the type awarded here", were not authorized under § 706(g) of Title VII. Failing to consider the prayer for declaratory relief in petitioner's complaint, the court of appeals directed the district court to enter judgment for respondent, awarding costs against petitioner. The questions presented are:

1. Whether or not compensatory damages other than back pay are available in an action brought pursuant to Title VII of the Civil Rights Act of 1964, where the plaintiff proves intentional sex discrimination with respect to working conditions.

2. Whether or not plaintiff must prove that, at the time suit was brought, she was entitled to back pay or injunctive relief in order to be declared the "prevailing party" within the meaning of Title VII of the Civil Rights Act of 1964.

3. Whether or not the court of appeals erred in failing to consider the value and the availability of an independent award of declaratory relief to a plaintiff who proved intentional sex discrimination in violation of Title VII of the Civil Rights Act of 1964.

STATUTORY PROVISIONS INVOLVED

1. This case involves various provisions of Title VII of the Civil Rights Act of 1964, Title 42 United States Code § 2000e, *et seq.*, relevant portions of which are fully set forth in the Appendix at pp. A28-A30.

2. This case also involves the provisions of the Federal Declaratory Judgment Act, Title 28 United States Code §§ 2201 and 2202, which are fully set forth in the Appendix at p. A28.

STATEMENT OF THE CASE

Jeanne Harrington, a physical education teacher, brought this action against her employer, the Vandalia-Butler Board of Education, alleging that she was subjected to discriminatory terms, conditions and privileges of employment in violation of Title VII of the Civil Rights Act of 1964, Title 42 United States Code § 2000e, *et seq.* (hereinafter "Title VII" or "the Act").[1] On the basis

1. Jurisdiction of the district court was invoked pursuant to Title 28 United States Code § 1343(4) and Title 42 United States Code § 2000e-5(f)(3). A declaratory judgment was sought pursuant to the provisions of Title 28 United States Code §§ 2201 and 2202.

of the evidence presented, both the trial and appellate courts found that petitioner had been subjected to intentional violations of Title VII. Notwithstanding this finding, the appellate court ordered that judgment be entered for respondent.

The opinions of the courts below, when read *in pari materia*, establish the following facts. The junior high school, at which petitioner taught for thirteen years, had two physical education facilities, the girls' gymnasium and the field house. Respondent, when making yearly room assignments for both teachers and students, consistently assigned petitioner to teach in the smaller of the two physical education facilities and reserved the exclusive use of the larger field house to petitioner's male counterparts. The girls' gym, located in the basement of the junior high school, lacked bleachers or seating of any kind and students who were not participating in a given activity were thus compelled to sit on the tile floor, thereby decreasing the already limited playing area. Although the girls' gym originally had windows near the ceiling which provided a source of natural light and ventilation, these windows were removed while petitioner was on summer recess, leaving the facility with no source of fresh air and solely dependent upon artificial lights. Additionally, while petitioner was conducting classes, the girls' gym was often used as a passageway for transporting general school supplies and debris.

By contrast, the field house, a separate building adjacent to the junior high school, contained seating in the form of retractable bleachers. These bleachers could be collapsed during class time in order to make maximum use of the wooden floor. The facility had large windows, providing the structure with ample natural light and fresh air.

Not only was the girls' gym less conducive to effective teaching and coaching than the field house, but the accommodations provided for the teachers (such as showers, toilets, lockers and offices) were neither equal nor comparable. Male physical education teachers were guaranteed an office which was totally self-contained and could be locked to insure privacy and to prevent theft, while petitioner's office ". . . was a small, unsecure space carved out of the girls' locker room by a partition providing only partial privacy. Male physical education teachers were provided with a private toilet, lockers and shower facilities for their exclusive use and which they did not share with students." Appendix at p. A11. However, no such private facilities were available to the petitioner, thus forcing her either to share these facilities with the students, or, as one defense witness testified during trial, ". . . she could change in her office. . . ."

The proof of unequal working conditions does not end with a physical comparison of the two structures. Although petitioner had always recognized the disparity of her working environment *vis-a-vis* her male counterparts, with the removal of the windows she began publicly protesting respondent's unlawful activity. After eight (8) months of vocal protests, which received unsatisfactory responses, petitioner filed a union grievance. Having failed to elicit any positive results in response to the grievance, petitioner continued to question publicly respondent's failure to equalize conditions. In response to these lawful protests, respondent compounded the existing Title VII violation by creating a total working environment charged with discrimination. Although in previous years (before her protests became vocal) petitioner's performance won her high praise, she was now the subject of constant and ever present observations and criticism.

Compounding the oppressive atmosphere created by the respondent's intense surveillance were threats that petitioner's teaching contract would be non-renewed.

The entire situation reached a climax on June 9, 1972. Rather than non-renew petitioner's contract altogether, respondent elected to transfer petitioner to another school and assigned her to teach social studies, a subject which she had not taught for thirteen years. Petitioner chose not to accept this transfer and reassignment and elected to retire.

Having fulfilled all conditions precedent to a suit pursuant to Title VII, trial to the court was had on June 2nd and 3rd, 1976. Neither party requested a trial by jury.

The trial court, whose Findings and Conclusions are set forth in the Appendix at pp. A1-A8, entered judgment in favor of petitioner, finding that petitioner had been discriminated against with respect to her terms and conditions of employment. Recognizing the serious nature of this violation of federal law, and the inappropriateness of back pay as relief for the injury suffered, the court awarded petitioner Six Thousand Dollars ($6,000.00) "as compensation", plus costs and reasonable attorneys' fees.

On appeal, the United States Court of Appeals for the Sixth Circuit found that, "[t]he trial judge's finding that Mrs. Harrington was discriminated against on account of her sex has support in the record." Appendix at p. A11. The appellate court went on to find that, "[t]he intentionally discriminatory nature of the disparity was shown by evidence that when a male teacher was assigned to teach girls' physical education, he was assigned to the larger gymnasium and was not required to move his offices or to work in the girls' gym." Appendix at pp. A11-

A12. Despite these findings, the court held that petitioner was not the prevailing party within the meaning of § 706(k) of the Act. Having held that petitioner was not entitled to some form of relief at the time suit was brought, the court went on to hold that a judicial determination that respondent engaged in intentional discrimination, standing alone, is not sufficient to constitute her as the prevailing party. Appendix at p. A20.

The court thus reversed the decision of the trial court and remanded the case for entry of judgment in favor of respondent. Costs of the appeal were taxed against petitioner (appellee) pursuant to the provisions of Rule 39(a), Federal Rules of Appellate Procedure.

On January 15, 1979, after twice demonstrating that respondent had intentionally violated her civil rights, petitioner was ordered to pay respondent Six Hundred Fifty-Three Dollars and Seventy-One Cents ($653.71). Appendix at p. A27.

REASONS FOR GRANTING THE WRIT

1. The Decision of the Court of Appeals Irreconcilably Conflicts With the Decisions of Other Courts of Appeals As to the Availability of Money Damages Other Than Back Pay Under Title VII

Section 706(g) of Title VII provides that a federal court, after finding ". . . that the respondent has intentionally engaged in . . . an unlawful employment practice charged in the complaint, . . .", may enjoin the unlawful activity, and order such affirmative action as appropriate. Although courts are specifically authorized to award back pay as one form of "affirmative action", the Act nowhere forbids an award of other types of monetary relief.

While this Court has never directly addressed the issue of the scope of money damages available under Title VII, consideration has been given to the breadth of § 706(g). In *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976), this Court rejected strict adherence to the National Labor Relations Act, 29 United States Code § 151, *et seq.*, as a model for interpreting § 706(g). Following a lengthy discussion of the legislative histories of both the 1972 Amendments to § 706(g) of Title VII and §§ 160(b) and (c) of the National Labor Relations Act, this Court concluded that the addition of the phrase, "any other equitable relief as the court deems appropriate" in § 706(g) serves as an ". . . emphatic confirmation that federal courts are empowered to fashion such relief as the particular circumstances of a case may require. . . ." 424 U.S. at 764. This Court went on to recognize that, "[t]o the extent that there is a difference in the wording of the respective provisions, § 706(g) grants, if anything, broader discretionary powers than those granted the National Labor Relations Act." 424 U.S. at 769, n.29.

In holding that compensatory damages are never available under Title VII, the Sixth Circuit ignored the teaching of *Franks* and instead relied almost exclusively upon *Van Hoomissen v. Xerox Corp.*, 368 F. Supp. 829 (N.D. Cal. 1973), a decision pre-dating *Franks* by three years. The decision in *Van Hoomissen*, quoted at length by the Sixth Circuit, posits two reasons for its conclusion. The first is the "not terribly illuminating" legislative history surrounding the enactment of the 1972 amendments to § 706(g) and the second is a comparison to the relief available under the National Labor Relations Act, §§ 160(b) and (c).

The *Van Hoomissen* court erroneously concluded that, since neither punitive nor compensatory damages have been awarded under the National Labor Relations Act, "Congress did not intend that any money damages other than back pay would be granted under [Title VII]." 368 F. Supp. at 837.

Additionally, the Sixth Circuit ignored circuit court authority which awarded compensatory relief other than back pay.

In *Evans v. Sheraton Park Hotel*, 503 F.2d 177 (D.C. Cir. 1974), the court upheld an award to the plaintiff of $1,100.00 for discriminatory assignments and $500.00 for harassment. While the $1,100.00 might be viewed as back pay in the nature of lost earnings, the award of $500.00 cannot be so characterized. In *Rosen v. Public Service Electric and Gas Co.*, 477 F.2d 90 (3rd Cir. 1973), the Court of Appeals for the Third Circuit was asked to award damages to persons injured by defendant's discriminatory retirement program. In allowing such an award, the court concluded that § 706(g) of the Act mandated federal courts to award compensatory damages designed to make injured plaintiffs whole.

Most recently, the Court of Appeals for the Tenth Circuit affirmed a damage award of $2,450.00 to a Title VII plaintiff. In *Rutherford v. American Bank of Commerce*, 565 F.2d 1162 (10th Cir. 1977), *aff'g Rutherford v. American Bank of Commerce*, 11 EPD ¶ 10,829 (D. N.M. 1976), the district court stressed the make whole objective of Title VII in awarding damages where back pay was inappropriate.[2]

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2. The Sixth Circuit cites *Pearson v. Western Electric Co.*, 542 F.2d 1150 (10th Cir. 1976), as holding that compensatory damages are not recoverable under Title VII. To the extent such a reading is correct, it fails to take into account the Tenth Circuit's subsequent pronouncement in *Rutherford*.

The natural consequence of this conflict among the circuits will be a continuing inability of district courts to impose uniform standards of relief to remedy violations of Title VII. Not only will these long time conflicts among district courts be encouraged; *compare, Curran v. Portland Superintending School Committee,* 435 F. Supp. 1063 (D. Me. 1977); *Compston v. Borden, Inc.,* 424 F. Supp. 157 (S.D. Ohio 1976); and *Tooles v. Kellogg Co.,* 336 F. Supp. 14 (D. Neb. 1972) (refusing to award compensatory damages) *with Tidwell v. American Oil Co.,* 332 F. Supp. 424 (D. Utah 1971); *Humphrey v. Southwestern Portland Cement Co.,* 369 F. Supp. 832 (W.D. Tex. 1973), *rev'd on merits,* 488 F.2d 691 (5th Cir. 1974); and *Hyland v. Kenner Products Co.,* 13 FEP Cases 1309 (S.D. Ohio 1976) (allowing monetary relief other than back pay),[3] but the Congressional purpose of Title VII will be frustrated.

The primary objective of Title VII is the elimination of employment discrimination. *Griggs v. Duke Power Co.,* 401 U.S. 424 (1971). A constricted inflexible standard controlling the relief which properly can be afforded victims of discrimination, such as that adopted by the Sixth Circuit, cannot harmoniously co-exist with the Act.

In the present case, both the trial and appellate courts found that the respondent intentionally had discriminated against petitioner within the meaning of § 703(a) of Title VII. Nevertheless, the Sixth Circuit denied petitioner any relief and refused to declare her the prevailing party.

3. In *Fitzpatrick v. Bitzer,* 427 U.S. 445 (1976), this Court upheld the 1972 Amendments to Title VII as authorizing ". . . federal courts to award *money damages* in favor of a private individual against a state government, . . ." 427 U.S. at 447 (emphasis added). The use of the phrase "money damages" only serves to further the existing conflict for, without further guidance from this Court, lower courts are unable to determine its precise meaning.

It is indeed incongruous to leave an injured plaintiff without a remedy in light of the Act's avowed purpose.[4]

The need to have the conflict among the circuits resolved authoritatively by this Court is manifest. With the ever increasing number of actions being filed pursuant to Title VII,[5] the conflict is far from narrowly confined and will have continuing future consequences as litigants and courts alike grapple with the question of the appropriate relief to remedy statutory violations.

This conflict and its long range implications thus justify the grant of certiorari to review the judgment of the Sixth Circuit.

2. The Decision of the Court of Appeals Presents a Direct Conflict With Decisions of This Court

A.

In 1973, this Court, in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), established as a matter of law, those elements which a plaintiff must establish in order to make out a violation of Title VII. While these elements must be applied in a flexible manner, *see, Furnco Construction Corp. v. Waters,* ..... U.S. ....., 98 S. Ct. 2943, 2949 (1978), the Sixth Circuit's ruling in the instant

4. The consequences of holding compensatory relief other than back pay to be unavailable may not have been fully appreciated by the courts in *Van Hoomissen* and *Curran,* relied upon by the Sixth Circuit. Both of those cases dismissed plaintiff's prayer at the pleading stage. Here, however, the full impact of such a holding is readily apparent and an admittedly injured litigant is being denied make-whole relief.

5. Statistics taken from the REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, March 10-11, 1977, and September 15-16, 1977, p. 219, Table 25 (U. S. Government Printing Office Stock No. 028-004-00014-1), show that total number of Title VII cases filed in federal district courts were:

1972	1,015	1975	3,931
1973	1,787	1976	5,321
1974	2,472	1977	5,931

case has superimposed requirements upon plaintiffs which have no relevance to the proof of a violation of the law.

The central focus in Title VII litigation is not the scope of relief available, but rather whether or not an employer covered by the Act is treating some employees less favorably than other employees because of their sex. *Furnco Construction Corp. v. Waters*, 98 S. Ct. at 2949. However, in the case under consideration, the Sixth Circuit focused upon the scope of relief available. The ruling of the appellate panel requires a Title VII litigant to establish not only that she has been the victim of unlawful discrimination, but also that she ". . . must have been entitled to some form of relief at the time suit was brought," Appendix at p. A20, in order to prevail and avoid the imposition of costs.[6] Such an interpretation of Title VII conflicts with this Court's decision in *McDonnell Douglas* for it impermissibly compounds a plaintiff's burden of proof.[7] "Only when the existence of a Title VII violation has been established is it relevant to consider appropriate remedies under the Act." *Acha v. Beame*, 570 F.2d 57, 65 (2nd Cir. 1978).

A further consequence of imposing a requirement of proving entitlement to relief as part of a Title VII plaintiff's case will be to preclude the use of bifurcated trials, a practice expressly approved by this Court. *See, International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 371-72 (1977).[8]

6. Petitioner believes that relief is available pursuant to the Federal Declaratory Judgment Act. Additionally, petitioner was and is today entitled to an injunction which would order the expungement of the eighteen unsatisfactory performance reviews from her personnel file. Appendix at p. A5.

7. This holding also conflicts with circuit court decisions which, although denying back pay and injunctive relief to plaintiffs who challenged state female protective legislation, still declared them to be the prevailing parties. *See, Kober v. Westinghouse Electric Corp.*, 480 F.2d 240 (3rd Cir. 1973), and cases cited therein.

B.

The question of whether or not petitioner has been the victim of unlawful discrimination is no longer an issue in this litigation. Thus, the sole remaining issue for the court should be the formulation of appropriate relief. The complaint in this action contains a prayer for a declaratory judgment pursuant to Title 28 United States Code §§ 2201 and 2202, as well as a prayer for equitable relief authorized by Title VII. Nevertheless, the Sixth Circuit, in conflict with decisions of this Court, ignored the availability of declaratory relief.[9]

This Court has held that ". . . a federal district court has the *duty to decide* the appropriateness and merits of the declaratory request irrespective of its conclusion as to the propriety of the issuance of [an] injunction." *Zwickler v. Koota*, 389 U.S. 241, 254 (1967) (emphasis added). In *Steffel v. Thompson*, 415 U.S. 452 (1974), this Court again stressed that declaratory relief should be considered independent of other forms of relief. Furthermore, the circuit court's failure to consider the availability of declaratory relief is contrary to the Congressional view of the Declaratory Judgment Act.

> The declaratory judgment differs in no essential respect from any other judgment except that it is *not followed by a decree for damages, injunction, specific performance, or other immediately coercive decree.* It declares conclusively and finally the rights of parties in litigation over a contested issue, a form of relief which often suffices to settle controversies and fully administer justice.

8. Moreover, such a holding calls into question the viability of Rule 42(b), Federal Rules of Civil Procedure.

9. See also discussion, *supra* at 12, n.6.

S. REP. No. 1005, 73rd Cong., 2d Sess. 2 (1934) (emphasis added). The intent of Congress and the teachings of this Court with respect to the availability and value of declaratory relief and the affirmative obligation to impose it when a federally protected right has been invaded leave little doubt that the court of appeals erred in failing to consider petitioner's prayer.[10]

C.

The entry of judgment against petitioner and the concomitant order that she pay respondent's costs on appeal will have far-reaching consequences for the future of Title VII litigation.

The role of the "private attorney general" is of utmost importance to the effective implementation of the objectives of Title VII. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). To permit cost awards to be entered against Title VII litigants who establish that they were subjected to intentional violations of the Act, merely because they have not shown an entitlement to monetary or injunctive relief, erodes established federal policy favoring private enforcement.

The Sixth Circuit used strong language characterizing petitioner's litigation as "fruitless". Appendix at p. A22. However, the distinction between "fruitless" and "frivolous" litigation is difficult to discern. One renders a plaintiff liable for costs; the other exposes a plaintiff to liability for attorneys' fees. Compare the instant case with *Christiansburg Garment Co. v. EEOC*, 434 U.S. 413, 421 (1978), where this Court, recognizing the value served by private

10. As the opinion of the appellate court so clearly states, ". . . plaintiff succeeded in obtaining a judicial determination that the defendant Board discriminated against her. . . ." Appendix at p. A20. At the very least such a finding should require a declaration that petitioner prevailed within the meaning of § 706(k) of Title VII. See, *Bell v. Hood*, 327 U.S. 678, 684 (1946); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975).

litigants in Title VII enforcement, established a strict standard for awarding fees against plaintiffs: no sanction is to be imposed upon a litigant whose cause is well-grounded. Plaintiffs risk much in attempting to secure Congressionally-promised rights when an admittedly just cause is rendered a nullity by the facile application of the Sixth Circuit's new and protean standard. Litigation to enforce civil rights guaranteed by federal law cannot be labeled "fruitless" merely because the violation's effect cannot be measured in cash. The recasting of the *Christiansburg Garment* standard by the appellate court so as to require the imposition of costs against oft-time impecunious plaintiffs, in spite of proof of intentional violations of federal law, will discourage many valid Title VII actions. In *Christiansburg Garment*, this Court demonstrated its belief that such a result must be avoided.[11] 434 U.S. at 420.

In light of the factual findings of the Sixth Circuit, the failure to consider the appropriateness of declaratory relief and the imposition of costs against petitioner conflicts with decisions of this Court and the purpose for which Title VII was enacted. For this reason, the writ should be granted.

11. The conflict between this Court's opinion in *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976), and the Sixth Circuit's opinion herein has been discussed, *supra* at 8.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit should be granted.

Respectfully submitted,

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APPENDIX

FINDINGS OF FACT, OPINION AND CONCLUSIONS OF LAW OF THE DISTRICT COURT

(Filed August 18, 1976)

Civil No. C-3-74-73

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

JEANNE HARRINGTON,
Plaintiff,

v.

VANDALIA-BUTLER BOARD OF EDUCATION,
Defendant.

FINDINGS OF FACT, OPINION AND CONCLUSIONS OF LAW

This matter is before the Court following a trial on the merits at which testimony and evidence was presented and upon pretrial and post-trial memoranda. In accordance with Rule 52 of the Federal Rules of Civil Procedure, the Court does submit herewith its findings of fact, opinion, and conclusions of law.

FINDINGS OF FACT

I.

1. At all times pertinent to this litigation plaintiff Jeanne Harrington held a teaching certificate authorizing her to instruct in the subjects of physical education and

social studies. The defendant is a local school board, organized and existing under the laws of the State of Ohio. Among other schools within its jurisdiction is Morton Junior High School, located in the City of Vandalia, Montgomery County, Ohio.

The defendant Board is an employer within the meaning of Title 42 U.S.C. 2000e-(b).

2. Plaintiff was hired by the defendant Board in 1957 to teach social studies and to serve as a guidance counselor. In 1958 or 1959 plaintiff was assigned the exclusive duty of teaching girls' physical education at the Morton Junior High School.

Plaintiff instructed in this position until June of 1972, at which time she was notified by the defendant of transfer to another school and assignment to teach social studies. Plaintiff declined to accept such reassignment and accepted instead voluntary disability retirement.

As of June, 1976, plaintiff appears to be substantially disabled by a hearing loss and does not appear to be physically able to instruct students in subjects for which she holds certificates.

At no time between 1957 and 1972 did the plaintiff possess the academic credentials that would qualify her for "tenure" as the same is defined in Ohio Revised Code §3319.11.

3. Subsequent to the events of June of 1972, plaintiff filed a charge of discrimination with the United States Equal Employment Opportunity Commission. All appropriate procedural requirements were met prior to the instituting of suit in the United States District Court.

4. At all times pertinent Morton Junior High School contained approximately the same number of male and

female students. As a junior high school it provided instruction at the 7th, 8th and 9th grade levels. Separate facilities for instruction in physical education were maintained. Girls gym classes were held in the Girls' Gym, located in a basement and almost entirely under ground. Small windows near the ceiling were removed during the year 1970. Ventilation was thereafter provided by ventilating fans located in the ceiling.

Girls' physical activities were conducted on two levels: an area known as the "deck" was used for instruction in bowling while the gym proper, approximately one floor below, was used for all other activities. While it is possible for the physical education instructor to observe both levels from a stairway landing, any instructional efforts at either level would remove the other from her observation.

The Girls' Gym lacked natural light and natural ventilation and the artificial light and ventilation created unsatisfactory physical surroundings. Plaintiff was provided with a small office adequate only for a desk and filing cabinet. No private shower or toilet facilities were provided for her.

5. Boys' physical education was conducted in a structure known as the "Field House". The floor area of the Field House is substantially larger than that of the Girls' Gym. There is natural light and ventilation from two levels of windows and both the locker room and shower facilities are larger than those provided in the Girls' Gym.

An office for male physical education teachers is available with a private toilet and shower facilities. During the period in question plaintiff was the sole instructor in physical education for girls while instruction in physical education for boys was provided by two male gym teachers, each of whom devoted one-half of his time to physical education and the other half to academic subjects.

6. Salaries paid to physical education instructors depend in the first instance upon the academic credentials of the teacher as well as length of service. No evidence was presented that there exists any differential for similarly qualified instructors on a male v. female ratio.

Where an instructor in physical education performs services for intramural activities, he is compensated by an additional supplementary contract in the amount of six percent (6%) of the amount of his base contract. While this percentage might involve a difference in total compensation paid, such difference is based upon the basic salary rather than upon a difference based upon sex. Plaintiff has failed to establish by a preponderance of the evidence that she was penalized in terms of salary for work done equivalent to that of male teachers.

7. The Field House is not used exclusively for instruction in physical education and for boy intramural activities. It has also been used consistently for interscholastic competition.

By reason of demand for seating, in approximately 1966 a portion of the structure was converted from an instructional area to spectator bleachers. Prior to this time both boys' and girls' physical education classes were held in the Field House. Subsequent to 1966 all girls' activities were moved to the Girls' Gym. At a time subsequent to 1972 a joint use of the two gymnasia began. Physical education teachers began instructing classes irrespective of sex and co-educational gym classes were likewise instituted. No material alteration of any facilities were required for this joint use.

8. During the spring of 1972 relations between plaintiff and administrative officials of the defendant substantially deteriorated. Exception was taken to plaintiff's circulation of a survey regarding physical education facilities and the enlistment of parents in her conflict with the defendant administration.

For the academic year 1971-1972, the plaintiff was evaluated by the principal of Morton Junior High School, Ralph Clay. This evaluation (Plaintiff's Exhibit 8) contains 25 categories. Plaintiff was evaluated at "average" in 18 of these categories and "above average" in 7. No evaluation in the categories: "Poor", "Needs Improvement", or "Outstanding" was recorded. The overall evaluation was held to be "Average".

In contrast, from March 2, 1972 to May 17, 1972, 18 separate annotations of unsatisfactory performance were entered in plaintiff's file. (Plaintiff's Exhibits 14-27, inclusive.) While defendants have used the term "observation" the preponderance of evidence has indicated that the appropriate word for the activity was "surveillance". Such intensive surveillance constituted harassment of plaintiff and interfered with her instructional efforts.

9. Plaintiff has established by a preponderance of the evidence that the athletic program, facilities and equipment during the period of time in question was substantially inferior for girl students. Plaintiff has not established standing to raise this question and, except as hereafter provided, may not recover for such discrimination.

Plaintiff has not established by a preponderance of the evidence that she was discriminated against in terms of salary or in terms of job description. Plaintiff has established by a preponderance of the evidence that her working conditions were inferior to those of male teachers performing the same services, that the nature of the facilities was such that she could not properly supervise her entire class at the same time and that she was handicapped

by unsatisfactory working conditions and inadequate equipment. Plaintiff has, therefore established by a preponderance of the evidence, a prima facie violation of §704(a) [sic] of Title VII. Defendant has not sustained its burden of proof to justify such prima facie discrimination.

OPINION

II.

It is clear from the foregoing findings of fact that this case does not fit within the mold of most sex discrimination cases. The underlying disparity in working conditions, however, is no less actionable under Title VII than discriminatory wages, hours, or hiring practices. As was stated in *Rogers v. E.E.O.C.*, 454 F.2d 234 (5th Cir. 1971), *cert. denied* 406 U.S. 957 (1972):

> . . . [T]oday employment discrimination is a far more complex and pervasive phenomenon, as the nuances and subtleties of discriminatory employment practices are no longer confined to bread and butter issues. 454 F.2d at 238

That the plaintiff's students were the primary victims of the defendant's actions does not detract from Mrs. Harrington's right to equality in her working environment. *Rogers v. E.E.O.C., supra.*

Citing *Washington v. Davis*, ... U.S. ....., 44 U.S.L.W. 4789 (Decided June 7, 1976), defendant contends that, unless plaintiff proves intentional acts of discrimination, she may not recover under Title VII. Nothing in the *Washington* case supports this proposition. Indeed, the holding of *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) was reaffirmed in *Washington*: "Congress directed the thrust of the Act to the *consequences* of employment practices,

not simply the motivation." 401 U.S. at 432. *See, Albemarle Paper Co., v. Moody*, 422 U.S. 405, 422-423 (1975).

Having found a violation of the Act, the Court must now determine the scope of the remedy to be imposed. Defendant argues that *E.E.O.C. v. Detroit Edison Co.*, 515 F.2d 301 (6th Cir. 1975) precludes this Court from granting any relief in this case, since plaintiff is not entitled to backpay and damages may not be awarded. The Court is unwilling to accept defendant's suggestion that plaintiff may have a right but not a remedy. The precise holding of *Detroit Edison Co., supra* as to this particular issue is as follows:

> While affirmative action may not be limited to the reinstatement or hiring of employees with or without backpay, we believe that it is limited to relief of the same general kind, that is, equitable relief in the form of restitution. 515 F.2d at 309.

We do not read this language as precluding all compensatory relief in furtherance of this Court's equitable power to make plaintiff whole. As the Supreme Court noted in *Albemarle Paper Co., v. Moody*, 422 U.S. 405, 418 (1975):

> [W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to *adjust their remedies so as to grant the necessary relief. Bell v. Hood*, 327 U.S. 678, 684 (1946) (Emphasis added).

Plaintiff is not entitled to an award of back pay nor to reinstatement to her former position because of her present physical disability. Plaintiff is entitled to an award for discriminatory working conditions and the Court does determine that the appropriate compensation therefore is Six Thousand Dollars ($6,000.00), computed

on the basis of One Thousand Dollars ($1,000.00) per year for the years 1966-1972. As prevailing party, plaintiff is entitled to an award for reasonable attorney fees and the Court does assess that sum at Two Thousand Dollars ($2,000.00).

CONCLUSIONS OF LAW

III.

1. This Court has jurisdiction over this matter in accordance with 42 U.S.C. §2000e-5(f)(3).

2. Where a plaintiff performs equivalent services for equivalent pay, under working conditions substantially inferior to that of co-workers performing the same service for the same pay, such plaintiff establishes a right to recovery.

3. The prevailing party in a discrimination action of this sort is entitled to reasonable attorney fees in accordance with 42 U.S.C. §2000e-5(k).

4. In accordance with the foregoing, plaintiff is hereby awarded the sum of Six Thousand Dollars ($6,000.00) as compensation and the sum of Two Thousand Dollars ($2,000.00) as reasonable attorney fees together with costs.

LET JUDGMENT ISSUE IN ACCORDANCE WITH THE FOREGOING.

/s/ CARL B. RUBIN
United States District Judge

JUDGMENT ENTRY OF THE DISTRICT COURT

(Filed August 18, 1976)

Civil Action File No. C-3-74-73

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF OHIO

JEANNE HARRINGTON,
Plaintiff

vs.

VANDALIA-BUTLER BOARD OF EDUCATION,
Defendant

JUDGMENT

This action came on for trial before the Court, Honorable CARL B. RUBIN, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged that the Plaintiff JEANNE HARRINGTON recover of the Defendant VANDALIA-BUTLER BOARD OF EDUCATION, the sum of SIX THOUSAND DOLLARS and 00/00 CENTS ($6,000.00) as compensation and TWO THOUSAND DOLLARS and 00/00 CENTS ($2,000.00) as attorney fees and the costs of this action,

Dated at Dayton, Ohio, this 18th day of August, 1976.

JOHN D. LYTER
Clerk of Court

By: /s/ CAROLE A. MAKLEY
Dep.

OPINION OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed October 27, 1978)

No. 76-2646

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JEANNE HARRINGTON,
Plaintiff-Appellee,

v.

VANDALIA-BUTLER BOARD OF EDUCATION,
Defendant-Appellant.

APPEAL from the United States District Court for the Southern District of Ohio.

Before: EDWARDS and ENGEL, *Circuit Judges,* and NEESE, *District Judge.**

ENGEL, *Circuit Judge.* The Vandalia-Butler Board of Education (Board) appeals from a judgment of $6,000[1] and an award of $2,000 attorneys' fees and costs entered in the district court in favor of Jeanne Harrington, a former physical education teacher in Morton Junior High School in Vandalia, Ohio. The district court held that, in furnishing her working conditions inferior to those of male teachers performing the same services, the defendant Board discriminated against plaintiff Harrington on account of her

*Hon. C. G. NEESE, *District Judge,* United States District Court for the Eastern District of Tennessee, sitting by designation.

1. The $6,000 judgment was computed on the basis of $1,000 damages for the six years commencing in 1966.

sex, in violation of Section 703(a)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (1976).[2]

The trial judge's finding that Mrs. Harrington was discriminated against on account of her sex has support in the record. The evidence showed that the facilities provided Mrs. Harrington at Morton Junior High School were neither equal nor even comparable to those provided male physical education teachers. While male physical education teachers were given an office which was totally self-contained and could be locked to insure privacy and prevent theft, Mrs. Harrington's office was a small, unsecure space, carved out of the girls' locker room by a partition providing only partial privacy. Male physical education teachers were provided with a private toilet, lockers and shower facilities for their exclusive use and which they did not share with students. No such private facilities, however, were provided for Mrs. Harrington, forcing her to use the student facilities.[3] The intentionally discrim-

2.

(a) Employer practices

It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

3. We reject the Board's claim that Section 703(a)(1) of Title VII and its reference to "terms, conditions, or privileges of employment" was not intended to reach the actual working conditions of employees but rather was intended to be confined to the obligation to provide an equal opportunity for employment apart from the physical conditions thereof. *Potter v. Goodwill Industries of Cleveland,* 518 F. 2d 864 (6th Cir. 1975), held that plaintiff had established a *prima facie* case by demonstrating that she was a Negro, that because of her physical disability she needed a stool in order to perform her job, that she did not always have a stool, and that a white woman who needed a stool to perform her job was always provided with one. We do not believe

(*Continued on following page*)

inatory nature of the disparity was shown by evidence that when a male teacher was assigned to teach girls physical education, he was assigned to the larger gymnasium and was not required to move his offices or to work in the girls' gym.

In June, 1972 Mrs. Harrington elected to accept a voluntary disability retirement instead of transfer to another junior high school. She has not since sought to re-enter the Vandalia-Butler system as an active school teacher. While she asserted in her complaint filed in the district court that she was discriminated against in terms of salary and job description and claimed that her disability retirement was forced upon her, tantamount to a constructive discharge from her employer, the district court found these claims had not been established and she does not appeal from the denial of that relief. The district court's only finding of discrimination was in the area of working conditions and its award was compensatory to remedy this violation of Title VII.

I.

The Board's appeal calls for us to decide whether an award of compensatory damages of the nature involved here may properly be included as a part of the remedy provided in Title VII:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate.

Section 706(g) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g) (1976). We hold that the Congress did not intend to authorize the recovery of such damages under Title VII and accordingly reverse.

There is no direct Supreme Court authority and surprisingly little authority among the circuits on the question of whether compensatory damages, in addition to any backpay, can be awarded in a Title VII action. In *Equal Employment Opportunity Commission v. Detroit Edison Company*, 515 F. 2d 301 (6th Cir. 1975), *vacated on other grounds*, 431 U.S. 951 (1977), our court held that punitive damages were not recoverable under Title VII. The same logic which in *Detroit Edison* supported the denial of punitive damages applies equally to compensatory damages:

> The relief provisions of Title VII contained in Section 706(g) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g), do not specifically authorize an award of either compensatory or punitive damages for discrimination in employment practices. . . . [I]n dealing with its power to award punitive damages in this case, the court [district court below] referred to the 1972 amendment to Section 706(g) which provides:

Footnote continued—

it can be seriously contended that the furnishing of a private office, toilet and showers for male physical education teachers was not a "privilege" within the meaning of Title VII or that the denial to plaintiff of similar facilities as a female physical education teacher did not violate the Act. *Cf. Allen v. Lovejoy*, 553 F. 2d 522 (6th Cir. 1977).

> [T]he court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate.

We find no authority in the quoted language for the award of punitive damages. We know of no authority which holds that the awarding of punitive damages is equitable relief. The catchall phrase, "other equitable relief as the court deems appropriate," does not stand alone. It is limited, under the construction doctrine of *ejusdem generis,* to relief of the same kind as that specifically enumerated. While affirmative action may not be limited to the reinstatement or hiring of employees with or without back pay, we believe that it is limited to relief of the same general kind, that is, equitable relief in the form of restitution.

We are not unaware of arguments which have been made in favor of allowing punitive damages in Title VII cases. See Developments in the Law — Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv.L.Rev. 1109, 1261 (1971); Implying Punitive Damages in Employment Discrimination Cases, 9 Harv.Civ.Rights-Civ.Lib.L.Rev. 325 (1974). In two recent district court cases, it has been held that punitive damages may not be allowed in Title VII actions. See Van Hoomissen v. Xerox Corp., 368 F. Supp. 829 (N.D.Cal.1973), and Howard v. Lockheed-Georgia Co., 372 F.Supp. 854 (N.D.Ga.1974). In Van Hoomissen, the court considered the somewhat sketchy legislative history with respect to Section 706(g) and concluded that Congress did not intend to permit an

> award of punitive damages in Title VII cases. We have been cited to nothing in the legislative history which would compel a different determination.
>
> In the *Howard* case, the court found that Congress would have made clear any intention to authorize compensatory and punitive damages in Title VII cases.

515 F. 2d at 308-09.

Judge Lively's reference to *Van Hoomissen v. Xerox Corporation,* 368 F. Supp. 829 (N.D. Cal. 1973), is particularly useful to our consideration of the question of whether Congress intended to permit an award of compensatory damages. District Judge Oliver J. Carter observed in *Van Hoomissen*:

> The question of the propriety of punitive and compensatory damages in Title VII cases has only recently arisen in the courts, and the results have been mixed.
>
> Some courts have held that punitive damages are an appropriate form of relief in a Title VII case, e. g. Tooles v. Kellogg, 336 F.Supp. 14 (Neb.1972) (court struck claim for compensatory relief but allowed claim for punitive damages to be retained).
>
> Compensatory damages have also been allowed, e. g. Tidwell v. American Oil Co., 332 F.Supp. 424 (Utah 1971) (plaintiff allowed 6% interest on back wages and contributions defendant would have made to group life insurance plan and company savings); Rosen v. Public Service Electric and Gas Co., 477 F.2d 90 (3rd Cir. 1973) (male employees who received reduced retirement benefits where women in the same position were awarded full benefits received the difference).

Other cases have refused to award any monetary damages other than back pay on the theory that the statute speaks of back pay only as an additional and limited remedy to equitable relief, e. g. Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969) ("The demand for back pay is not in the nature of a claim for damages, but rather is an integral part of the statutory equitable remedy", 417 F.2d at 1125).

After examining the lengthy legislative history of Title VII, in addition to the briefer history surrounding the 1972 amendments, this Court finds that Congress, when it drew up that part of the statute dealing with remedies for unlawful employment practices, had in mind a wide panorama of equitable tools that courts might use but did not intend that courts would punish defendants by imposing upon them large money awards in the form of compensatory or punitive damages.

Although the 1964 discussion in Congress regarding Section 2000e-5(g) is not terribly illuminating, it does seem apparent from a reading of the Congressional debates and the legislative record that the main purpose of Title VII as seen by its proponents was to "seek to give people an opportunity to be hired on the basis of merit" (remarks by Senator Humphrey in introducing the Civil Rights Bill for debate in the Senate on March 30, 1964, 110 Cong. Rec. 6549). According to the House Report on the Bill, "(t)he purpose of this title is to eliminate, through the utilization of formal and informal remedial procedures, discrimination in employment" (House Report No. 914, 1964 U.S.Code Cong. and Admin.News 1964, p. 2401). Additional members of the House Committee which wrote that

Report referred to the Commission, the administrative body which would in large part carry out the purpose of the Title, as an agency which would work in a corrective, not a punitive, manner: "It must . . . be stressed that the Commission must confine its activities to correcting abuse, not promoting equality with mathematical certainty . . . Its primary task is to make certain that the channels of employment are open to persons regardless of their race" (*Id.* at p. 2516).

Again in 1972, when the amendment giving the Commission power to go into court on its own was being debated, the Title was again referred to primarily as a tool to ensure that opportunities for employment were in fact equal: it was not described as a punitive measure against those who frustrated equal employment. "Most people just want to work. That is all . . . We are trying to see that all of us, no matter what race, sex, or religious or ethnic background, will have an equal opportunity in employment" (Representative Dent, 118 Cong.Rec. 1866-67, March 8, 1972).

* * *

The Senate analysis of the 1972 amendment to § 2000e-5(g) accurately reflects the current sense of unease and uncertainty over the use of punitive damages in Title VII cases:

> "The provisions of this subsection are intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible. In dealing with the present section 706(g) the courts have stressed that the scope of relief . . . is intended to make the victims of unlawful discrimination whole . . . (and restore them) to a position where they would have been

were it not for the unlawful discrimination." (118 Cong.Rec. 3462).

In one breath the Senators note that the equitable powers given to the courts are extremely broad; in the next they speak rather imprecisely of making a person "whole". What is intended by that second goal? The problem mirrored here has been a source of confusion among the district courts.

However, in addition to the general legislative history which indicates that the remedies intended were those provided for in § 2000e-5(g), there are further factors which lead this Court to believe that Congress meant what it said in § 2000e-5(g) and that it meant no more.

The provisions of § 2000e-5(g) of Title VII are modeled closely upon the National Labor Relations Act, 29 U.S.C. §§ 160(b) and 160(c). In 29 U.S.C. 160(c), the remedies provided for are "affirmative action, including reinstatement of employees, with or without back pay." Punitive damages cannot, and have not been, awarded under this Act (Consolidated Edison Co. v. NLRB, 305 U.S. 197, 235-236, 59 S.Ct. 206, 219, 83 L.Ed. 126 (1938)). Neither have compensatory damages, aside from back pay, been allowed.

In explaining and introducing the Civil Rivhts [sic] Bill, Senator Humphrey in his address and Senators Clark and Case as Floor Managers refer to the fact that the relief under Title VII is similar to that available under the National Labor Relations Act (110 Cong.Rec. 6549, and 110 Cong.Rec. 7214). Although not conclusive, the similarity of the two statutes and the fact that Congress was aware that neither punitive nor compensatory damages were allowed under

> the National Labor Relations Act leads to the firm belief that Congress did not intend that any money damages other than back-pay would be granted under the present statute. . . . No reference has been made in either the Title VII or the Title VIII statutes to compensatory damages.

368 F. Supp. at 836-38 (footnotes omitted).

We note that while the district judge here was not persuaded by the analogy in *Detroit Edison, supra,* another judge of the same court has twice ruled that compensatory damages are not available. *Smith v. Columbus Metropolitan Housing Authority,* 443 F. Supp. 61 (S.D. Ohio 1977); *Compston v. Borden, Inc.,* 424 F. Supp. 157 (S.D. Ohio 1976). Likewise *Curran v. Portland Superintending School Committee,* 435 F. Supp. 1063 (D. Me. 1977), in holding that compensatory damages are not recoverable under Title VII, observes that:

> While there is a split of authority on the issue, the clear majority of federal courts, upon an analysis of the language and statutory history of Title VII, have concluded that neither compensatory nor punitive damages are available in a Title VII case, and this Court is persuaded to join them.

435 F. Supp. at 1078 and *see* authorities cited therein. *See also Pearson v. Western Electric Company,* 542 F. 2d 1150 (10th Cir. 1976).

Accordingly, we hold that compensatory damages of the type awarded here are not authorized under Section 706(g) of Title VII.

II.

It was not until March 24, 1972, that Title VII of the Civil Rights Act of 1964 was amended to apply to the federal government, state and local governments and educational institutions.[4] For this reason appellant claims that the district court was without jurisdiction to permit an award of damages for acts of discrimination occurring prior to the effective date of the amendment. This claim, if correct, would limit the damages, in any event, to such as might have been found to have been suffered between March 24, 1972 and June, 1972 when Mrs. Harrington took her retirement.

Because this issue appears to have been raised for the first time on appeal, we do not choose to address it. *Hutton v. United States,* 501 F. 2d 1055, 1062 (6th Cir. 1974).

III.

Because plaintiff has not prevailed, we conclude that the district court's award of attorneys' fees made under Section 706(k) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5(k) (1976), must likewise fail. It is true, of course, that the plaintiff succeeded in obtaining a judicial determination that the defendant Board discriminated against her in the conditions of her employment. This determination, standing alone, does not in our judgment suffice to constitute her as a prevailing party within the meaning of the Act.

In order to be a "prevailing party," a plaintiff must have been entitled to some form of relief at the time suit was brought. Here, Mrs. Harrington failed to establish

4. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103.

her claim that she was constructively discharged or that she was discriminated against in the salary she received. Thus neither backpay, reinstatement nor injunctive relief was awardable. She has not shown herself entitled to any relief under the Act and it is apparent that she was not so entitled at the time she commenced the district court action.

This case is distinguished from our decision in *Seals v. Quarterly County Court of Madison County, Tennessee,* 562 F.2d 390 (6th Cir. 1977). There we allowed an award of attorneys' fees even though the plaintiffs did not recover on their federal action, the suit being settled under pendent state law claims.[5] The plaintiffs could apparently have prevailed under their federal claim and received relief thereunder. *Marr v. Rife,* 545 F.2d 554 (6th Cir. 1976), similarly is not inconsistent witn the decision here. In *Marr v. Rife,* the plaintiffs, following a successful showing of discrimination in violation of the Fair Housing Act, 42 U.S.C. § 3601 *et seq.* (1976), were awarded $1.00 nominal damages and, as the prevailing party, also were awarded attorneys' fees. In *Marr v. Rife,* unlike here, the statute expressly authorized an award of damages, 42 U.S.C. § 3612 (c), the plaintiff merely being unable to establish the amount. Mrs. Harrington, however, never had any right to any relief under the statute at the time suit was brought. Under such circumstances it is not possible to determine that plaintiff is a prevailing party and is thereby permitted an award of attorneys' fees. An opposite result would,

5. Although the attorneys' fees issue in *Seals* was decided under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1976), rather than under Title VII, the standards for awarding attorneys' fees have been held to be generally the same. *See Nadeau v. Helgemoe,* No. 78-1019 (1st Cir., filed July 28, 1978).

in our judgment, run counter to the statute and would only serve to encourage fruitless litigation.[6]

Reversed and remanded for entry of judgment in favor of the defendant.

ORDER OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed December 11, 1978)

No. 76-2646

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JEANNE HARRINGTON,
Plaintiff-Appellee,

v.

VANDALIA-BUTLER BOARD OF EDUCATION,
Defendant-Appellant.

ORDER

Before: EDWARDS and ENGEL, *Circuit Judges* and NEESE, *District Judge**

No judge in regular active service of the court having requested a vote on the suggestion for a rehearing

6. In *Compton v. Borden, Inc., supra,* the court held that the plaintiff proved the essential elements of a Title VII claim but backpay and injunctive relief were not available because of the factual posture in which the case reached trial. The court nonetheless awarded attorneys' fees. To the extent *Compston* is inconsistent with the opinion herein, it is not the law in this circuit.

*Hon. C. G. Neese, *Judge,* United States District Court for the Eastern District of Tennessee, sitting by designation.

en banc, the petition for rehearing filed herein by the plaintiff-appellee has been referred to the panel which heard the original appeal. Upon consideration of said petition, the court concludes that it is without merit. Accordingly,

IT IS ORDERED that the petition for rehearing is hereby denied.

Entered by Order of the Court
/s/ JOHN P. HEHMAN
Clerk

JUDGMENT ENTRY OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed October 27, 1978 in the Court of Appeals;
Filed December 21, 1978 in District Court)

No. 76-2646

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JEANNE HARRINGTON,
Plaintiff-Appellee,

v.

VANDALIA-BUTLER BOARD OF EDUCATION,
Defendant-Appellant.

Before: EDWARDS and ENGEL, *Circuit Judges,* and NEESE, *District Judge.*

JUDGMENT

APPEAL from the United States District Court for the Southern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Southern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the cause remanded for entry of judgment in favor of the defendant.

It is further ordered that Defendant-Appellant recover from Plaintiff-Appellee the costs on appeal, as itemized below, and that execution therefor issue out of said District Court if necessary.

Entered by Order of the Court.

/s/ JOHN P. HEHMAN
Clerk

A True Copy.

Attest:

/s/ Jo ANN MCHALE
Deputy Clerk

Issued as Mandate: December 19, 1978

Costs: To be recovered by Appellant:

Filing fee	$ 50.00
Printing	$189.21
Total	$239.21

JUDGMENT ENTRY OF THE DISTRICT COURT

(Filed December 21, 1978)

Case No. C-3-74-73

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

JEANNE HARRINGTON,
Plaintiff,

v.

VANDALIA-BUTLER BOARD OF EDUCATION,
Defendant.

JUDGMENT

THIS CAUSE having been duly heard on the record by the Court of Appeals, Sixth Circuit, and the certified copy of the Judgment of the said Court of Appeals having been received by this United States District Court.

JUDGMENT is entered in accordance herewith in favor of the defendant Vandalia-Butler Board of Education and against plaintiff Jeanne Harrington. Costs are awarded to the defendant Vandalia-Butler Board of Education by the Court of Appeals in the amount of Two hundred thirty-nine dollars and twenty-one cents ($239.21), to be recovered from the plaintiff.

Dated at Dayton, Ohio, this 21st day of December, 1978

JOHN D. LYTER,
Clerk

By: /s/ KARLA S. ERWIN
Deputy Clerk

BILL OF COSTS IN THE DISTRICT COURT

(Filed December 26, 1978;
Taxed January 15, 1979)

Civil Action File No. C-3-74-73 (Judge Rubin)

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

JEANNE HARRINGTON,
Plaintiff

vs.

VANDALIA-BUTLER BOARD OF EDUCATION,
Defendant

Judgment having been entered in the above entitled action on the 21st day of December, 1978, against Plaintiff the clerk is requested to tax the following as costs:

BILL OF COSTS

Fees of the clerk	$.....
Fees of the marshal	.....
Fees of the court reporter for all or any part of the transcript necessarily obtained for use in the case	409.50
Fees and disbursements for printing	.....
Fees for witnesses (itemized on reverse side)	.....
Fees for exemplification and copies of papers necessarily obtained for use in case	.....
Docket fees under 28 U. S. C. 1923	50.00
Costs incident to taking of depositions	437.00
Cost as shown on Mandate of Court of Appeals	239.21

Other costs (Please itemize)

Appeal Notice	5.00
	.....
	.....
	.....
	.....
Total	$1140.71

State of Ohio)
) ss:
County of Montgomery)

I, Larry A. Smith do hereby swear that the foregoing costs are correct and were necessarily incurred in this action and that the services for which fees have been charged were actually and necessarily performed. A copy hereof was this day mailed to Randal Bloch, Attorney at Law, 700 Formica Bldg., Cincinnati, Ohio with postage fully prepaid thereon.

Please take notice that I will appear before the Clerk who will tax said costs on 15th January, 1979 at 10 AM

/s/ LARRY A. SMITH
Attorney for Defendant

Subscribed and sworn to before me this 26th day of December A. D. 1978 at Dayton, Ohio

/s/ RICHARD G. PRYOR
Notary Public—State of Ohio

Costs are hereby taxed in the amount of $653.71 this 15th day of January, 1979, and that amount included in the judgment.

JOHN D. LYTER
Clerk
By /s/ ROBERT L. SNELL
Deputy Clerk.

RELEVANT STATUTES INVOLVED

The Declaratory Judgment Act, 28 United States Code §§2201 and 2202

Sec. 2201. In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such. [As amended July 7, 1958, P.L. 85-508, Sec. 12(p).]

Sec. 2202. Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

Title VII of the Civil Rights Act of 1964, 42 United States Code §2000e, et seq. (Excerpted)

Sec. 703. (a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as

an employee, because of such individual's race, color, religion, sex, or national origin. [As amended March 24, 1972, P.L. 92-261, Sec. 8.]

* * * * *

Sec. 706. * * *

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

* * * * *

(k) In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person. [As amended March 24, 1972, P.L. 92-261, Sec. 4.]

Supreme Court, U. S.
FILED
APR 10 1979
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1978

No. 78-1392

JEANNE HARRINGTON,
Petitioner,

vs.

VANDALIA-BUTLER BOARD OF EDUCATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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Supreme Court of the United States

October Term, 1978

No. 78-1392

JEANNE HARRINGTON,
Petitioner,

vs.

VANDALIA-BUTLER BOARD OF EDUCATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

Vandalia-Butler Board of Education, Respondent, opposes Harrington's Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

QUESTIONS PRESENTED

Respondent is satisfied with the Petitioner's summary of the questions presented for review, except insofar as question 1. implies that the Petitioner, as a Title VII plaintiff, proved "intentional sex discrimination". (See discussion below at page 5, note 1.)

STATEMENT OF THE CASE

Jeanne Harrington brought this action against her employer, the Vandalia-Butler Board of Education, alleging that she was subjected to discriminatory terms, conditions, and privileges of employment in violation of Title VII of the Civil Rights Act of 1964, Title 42 United States Code §§2000e *et seq.* (hereinafter "Title VII" or "the Act"). Harrington further sought a declaratory judgment pursuant to Title 28 United States Code §§2201 and 2202. The courts below found the following facts. In 1957, Respondent hired Petitioner to teach social studies. In 1958 or 1959, Petitioner was assigned to teach girls' physical education at Morton Junior High School (Appendix at p. A2).* Until 1966, both girls' and boys' physical education at Morton Junior High was taught in a "field house." Additionally, interscholastic competition was held in the field house. Due to a demand for seating space, in 1966, a portion of the field house was converted from instructional area to spectator bleachers. Thereafter, girls' physical education classes were moved to a "girls' gym" (Appendix at p. A4).

*Respondent's references of pages in the Appendix refer to the decisions of the courts below as set forth in the Appendix to the Petition for Writ of Certiorari.

As a consequence, the Respondent maintained separate facilities for instruction in physical education. Petitioner was the sole instructor in girls' physical education while instruction in physical education for boys was provided by two male teachers, each of whom devoted one-half of his time to physical education and the other half to academic subjects (Appendix at p. A3). Girls' gym classes were taught in the girls' gym and boys' gym classes were taught in the field house. The girls' gym was almost entirely underground, and, in contrast to the field house, it lacked natural light and ventilation, had a smaller gym floor area, had smaller shower and locker room facilities, and had a smaller unsecure office, and no private toilet or shower facilities for the teacher (Appendix at pp. A3, A11). The District Court found that Petitioner's working conditions were inferior to those of male teachers performing the same services (Appendix at p. A5).

For the academic year 1971-1972, Petitioner was evaluated by the principal of Morton Junior High School as "Average" (Appendix at p. A5). (This is hardly "high praise" as indicated by Petitioner at page 5 of her Petition.) However, in the Spring of 1972, relations between the Petitioner and the administrative officials of the Respondent substantially deteriorated. Said officials took exception to Petitioner's circulation of a survey regarding the physical education facilities and the enlistment of parents in her conflict with the administration. Between March 2, 1972, and May 17, 1972, eighteen separate annotations of unsatisfactory performance were entered in the Petitioner's file (Appendix at pp. A4-A5). The District Court found that such activity amounted to "surveillance" and "harassment," and interfered with Petitioner's instructional efforts (Appendix at p. A5).

In June, 1972, Respondent notified the Petitioner of her transfer to another school and assignment to teach social studies. Petitioner declined to accept such reassignment and accepted instead voluntary disability retirement. Petitioner is substantially disabled by a hearing loss and is physically unable to instruct students (Appendix at p. A2).

Thereafter, a joint use of the two gymnasia began with the institution of coeducational gym classes, all without material alteration of the facilities (Appendix at p. A4).

The District Court found that, since the Petitioner had failed to prove that she was penalized in terms of salary for work done equivalent to that of male teachers, that therefore she was not entitled to an award of back pay (Appendix at pp. A4, A7). Furthermore, Petitioner was not entitled to reinstatement because of her physical disability (Appendix at p. A7). However, the court found that Petitioner had been discriminated against with respect to her conditions of employment and entered judgment for the Petitioner in the amount of $6,000.00, as "appropriate compensation," together with costs and attorney fees (Appendix at pp. A7-A8).

Thereupon, Respondent prosecuted an appeal to the United States Court of Appeals for the Sixth Circuit. It is significant that Petitioner did not pursue a cross appeal based upon any action or failure to act by the trial court.

The Court of Appeals noted the different working conditions afforded Petitioner and found that "the intentionally discriminatory nature of the disparity was shown by evidence that when a male teacher was assigned to teach girls' physical education, he was assigned to the

larger gymnasium and was not required to move his offices or to work in the girls' gym" (Appendix at pp. A11-A12).[1] However, the court further held that compensatory damages of the type awarded by the trial court were not authorized by Title VII (Appendix at p. A19). The court further held that since Petitioner had failed to establish that she was entitled to any relief under the Act at the time suit was brought, that therefore, Petitioner was not a "prevailing party" and the District Court's award of attorney fees could not stand (Appendix at pp. A20-A21). The court reversed and remanded the case for entry of judgment in favor of the Respondent with costs of appeal taxed against the Petitioner (Appendix at p. A24).

---

1. Apparently in reliance on this language in the Court of Appeals' decision, the Petitioner repeatedly refers to "intentional sex discrimination" (Petition, pp. 2, 10) or "intentional violations of Title VII" (Petition, pp. 4, 7, 14, 15). It is submitted that such a "finding" by the Court of Appeals exceeded the bounds of appellate review and that the appellate court made a finding of fact which the trial court expressly refused to do. The trial court was under the erroneous opinion that a Title VII plaintiff need not prove intentional discrimination and that the motive of an employer was irrelevant as not part of a Title VII action (Appendix at pp. A6-A7). However, the contrary was made abundantly clear in this Court's recent decision in *Furnco Construction Corp. v. Waters*, ____ U.S. ____, 98 S. Ct. 2943 (1978), where the Court noted, at 2951, that "a *McDonnell Douglas* prima facie showing is not the equivalent of a factual finding of discrimination, ... Rather, it is simply proof of actions taken by the employer from which we infer discriminatory *animus*. . . ." (Emphasis added). Also see, *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 at 415, n.15 (1977) ("proof of discriminatory motive is critical"). In the instant case, the trial court expressly refused to make such an inference and held that a mere difference in treatment makes out a prima facie violation of Title VII (Appendix at pp. A5-A7). Thus, insofar as the Court of Appeals found intentional discrimination, it was not upholding any finding of the trial court. Rather, it went beyond the bounds of appellate review and made a finding sua sponte. (It is interesting to note that the trial court's decision in the instant case suffered severe criticism in *Scott v. Anniston*, 430 F. Supp. 508, 514-515 (N.D. Ala. 1977).)

REASONS FOR DENYING THE WRIT

1. The Decision of the Court of Appeals Does Not Conflict With Applicable Decisions of This Court; Rather It Is in Harmony With Such Decisions

As noted by Petitioner, this Court has never directly decided the issue of the scope of monetary relief available under Title VII.

However, this court has often made the general observation that Title VII is designed to arm the courts with full *equitable* powers. E.g., *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975); that "in determining the specific remedies to be afforded, a district court is to 'fashion such relief as the particular circumstances of a case may require to effect *restitution.*'" *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 364 (1977) (emphasis added); that "the fashioning of an appropriate remedy invokes the sound *equitable* discretion of the district courts." *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 770 (1976) (emphasis added).

Furthermore, this Court has drawn analogies between the relief available under Title VII as compared with that available under Title VIII, 42 United States Code §3601 *et seq.*, and the Age Discrimination in Employment Act, 29 United States Code §§621 *et seq.* (ADEA). In *Curtis v. Loether*, 415 U.S. 189 (1974) this Court decided that the Seventh Amendment to the United States Constitution entitles either party in a Title VIII action to demand a jury trial. Therein, this Court descredited an analogy between Title VIII and Title VII with the following discussion:

> "In Title VII cases, the courts of appeals have characterized back pay as an integral part of an equitable remedy, a form of restitution. But the statuory language [of Title VII] contrasts sharply with [Title VIII's] simple authorization of an action for actual and punitive damages. * * * Whatever may be the merit of the 'equitable' characterization in Title VII cases, there is surely no basis for characterizing the award of compensatory and punitive damages here as equitable relief." *Ibid.* at 197.

The Court also observed that actual and punitive damages were the traditional forms of relief offered in courts of law. *Ibid.* at 196.

Similarly, in *Lorillard v. Pons*, 434 U.S. 575 (1978), this Court decided that an ADEA plaintiff had a right to jury trial. The defendant had argued that the case law of Title VII was analogous authority for the opposite conclusion. This Court refuted that argument thusly:

> "Looking first to the statutory language defining the relief available, we note that Congress specifically provided for both 'legal or equitable' relief in the ADEA, but did not authorize 'legal' relief in so many words in Title VII. * * * . . . the availability of back pay is a matter of equitable discretion. . . ." *Ibid.* at 197.

Thus, while this Court has not specifically decided the scope of monetary relief under Title VII, it has indicated that Title VII relief is limited to equitable relief. In this regard, the decision of the Court of Appeals is in harmony with applicable decisions of this Court.

At pages 8 and 9 of the Petition, Petitioner criticizes the Court of Appeals for adopting the rationale of *Van Hoomissen v. Xerox Corp.*, 368 F. Supp. 829 (N.D. Cal. 1973), insofar as it used the National Labor Relations Act, 29 United States Code §§151 *et seq.* (NLRA) for a model in determining the scope of relief available under Title

VII. In making that criticism, Petitioner implies that such a use of the NLRA was in conflict with this Court's comments in *Franks v. Bowman Transportation Co., supra.* The Petitioner's characterization of the holding in *Franks v. Bowman Transportation Co.* is misleading and patently inaccurate. In that case, this Court did not "reject strict adherence" to the NLRA as a model for interpreting the relief available under Title VII. On the contrary, this Court recognized that §160(c) of the NLRA was the model for, and was a particularly valuable tool, in determining the relief available under §706(g) of Title VII. 424 U.S. at 769 and 774. In fact, the majority criticized the dissent for not adequately treating the standards under the NLRA as a model for fashioning Title VII relief. 424 U.S. at 774, n.34.

The fact that *Van Hoomissen* was decided before *Franks v. Bowman* would seem irrelevant in light of the fact that this Court has used the NLRA as a model in applying Title VII in decisions both before and after *Franks v. Bowman. See, Albemarle Paper Co. v. Moody, supra,* 419; and *International Brotherhood of Teamsters v. United States, supra,* 366.

The misleading nature of Petitioner's presentation of *Franks v. Bowman* is further demonstrated by the convenient deletion of certain limiting language. After noting the 1972 amendments to Title VII §706(g), this Court concluded that the addition of the phrase "any other equitable relief as the court deems appropriate" in §706(g) serves as an ". . . emphatic confirmation that the federal courts are empowered to fashion such relief as the particular circumstances of a case may require *to effect restitution,* . . .". 424 U.S. at 764. The italicized portion of the above quote is significantly absent from Petitioner's quotation of the identical passage. Petitioner ignores that language and then argues that *Franks v. Bowman* stands for the proposition that a court may fashion whatever relief it desires, including money damages not related to back pay. However, the italicized language indicates that this Court had equitable remedies in mind when it described the power of federal courts to fashion relief under Title VII 706(g). In fact, the entire discussion of remedies in *Franks v. Bowman* is pervaded with comments about the court's *equitable* powers and *equitable* discretion. 424 U.S. at 764-770. To like effect, see, *Albemarle Paper Co. v. Moody, supra,* 416-421; and *International Brotherhood of Teamsters v. United States, supra.*

Thus, contrary to what the Petitioner would lead this Court to believe, the decision of the Court of Appeals in the instant case, as well as the decision in *Van Hoomissen,* is in harmony with and does not conflict with *Franks v. Bowman* or any other applicable decision of this Court.

2. The Decision of the Court of Appeals Does Not Conflict With the Decisions of Other Courts of Appeals As to the Availability of Monetary Relief Other Than Back Pay Under Title VII

At page 9 of her Petition, Petitioner argues that "the Sixth Circuit ignored circuit court authority which awarded compensatory relief other than back pay," citing *Evans v. Sheraton Park Hotel,* 503 F.2d 177 (D.C. Cir. 1974); *Rutherford v. American Bank of Commerce,* 565 F.2d 1162 (10th Cir. 1977), *aff'g* 11 EPD ¶10,829 (D. N.M. 1976); and *Rosen v. Public Service Electric and Gas Co.,* 477 F.2d 90 (3rd Cir. 1973). As the following will demonstrate, Petitioner has again inaccurately represented the holdings of case law.

It is true that in *Evans v. Sheraton Park Hotel, supra,* the court of appeals affirmed the district court's ruling which awarded $1100.00 for discriminatory job assignments

and $500.00 for harassment. Petitioner indicates that "the $1100.00 might be viewed as back pay in the nature of lost earnings." Actually, there is no doubt that the $1100.00 was in the nature of back pay for the Court stated that "having found [violations of Title VII] vests in the district court discretionary authority to order, as part of the affirmative action necessary to obviate such unlawful employment practices, that the party responsible pay to the aggrieved person *back pay damages* calculated to restore such person to his or her rightful economic place. 'The demand for back pay is not in the nature of a claim for damages, but rather is an integral part of the statutory *equitable* remedy, to be determined through the exercise of the court's discretion.'" *Ibid.* 186 (emphasis added; citations omitted).

As for the $500.00 award for harassment, it is clear that the propriety of granting such damages was not an issue on appeal. The district court, without discussion or citation of authority, awarded $500.00 against only one of the defendants, the hotel. (See, *Evans v. Sheraton Park Hotel*, 5 EPD ¶8079 (D. D.C. 1972).) Since the hotel did not appeal (see, 503 F.2d 177, 180 n.1), the court of appeals never really decided the issue.

Furthermore, it is difficult to see how Petitioner can characterize $500.00 for harassment as "compensatory relief other than back pay," especially in light of later cases from the District Court for the District of Columbia. In *Dual v. Griffin*, 446 F. Supp. 791, 800-1, n.40 (D. D.C. 1977), the court noted that it was doubtful that *Evans* could be read as permitting compensatory damages. Moreover, in *Saad v. Burns Intern. Sec. Services, Inc.*, 456 F. Supp. 33, 37 (D. D.C. 1978), the court held that compensatory and punitive damages were not available under Title VII "by an overwhelming majority of the courts."

Petitioner argues that the Sixth Circuit decision conflicts with *Rutherford v. American Bank of Commerce*, 565 F.2d 1162 (10th Cir. 1977), *aff'g* 11 EPD ¶10,829. Contrary to the representations of Petitioner, *Rutherford* did not grant compensatory damages "where back pay was inappropriate." In *Rutherford*, the district court held that "[the plaintiff] requested an award of back pay; she is entitled to equitable relief more appropriately in the form of restitution for that which she would have received but for the unlawful acts of [plaintiff's former employer]." The district court observed that back pay was "not appropriate" due to the peculiar facts of the case, but it is clear from the method of calculating the plaintiff's recovery, that the award, though a form of restitution, was at least similar to back pay. Thus, *Rutherford* is no authority for the proposition cited by Petitioner.

Additionally, Petitioner implies that, since *Pearson v. Western Electric Co.*, 542 F.2d 1150 (10th Cir. 1976)—a case cited by the Sixth Circuit—predates *Rutherford*, it is no longer the law of the Tenth Circuit. Such an argument is without foundation. One of the direct issues decided in *Pearson* was the availability of compensatory and punitive damages in a Title VII action. After a careful and well reasoned discussion of the law, the court held that such damages were not available in a Title VII action, and accordingly denied the plaintiff's claim for compensatory damages for injury to plaintiff's credit standing and good character and also denied the claim for punitive damages. It is absolutely inconceivable that the Tenth Circuit would overrule a case barely a year old without even discussing it. Moreover, as noted above, the availability of compensatory and/or punitive damages was not an issue and was not discussed in *Rutherford*.

Finally, Petitioner asserts that the Sixth Circuit decision conflicts with *Rosen v. Public Service Electric and*

Gas Co., 477 F.2d 90 (3rd Cir. 1973). It is true that *Rosen* itself describes the relief awarded as "compensatory damages." However, the court noted that "the relief is intended to restore those wronged to their rightful economic status absent the effects of the unlawful discrimination." *Ibid.*, 96. An analysis of *Rosen* indicates that the relief awarded therein was actually in the nature of back pay. See, *Loo v. Gerarge*, 374 F. Supp. 1338, 1342, n.7 (D. Hawaii 1974); and, *Dual v. Griffin, supra*, 800-1, n.40. Furthermore, district courts within the Third Circuit have noted that *Rosen* does not support the contention that general compensatory damages are available in a Title VII action. E.g., *Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists*, 401 F. Supp. 1363, 1371, n.6 (S.D. N.Y. 1975).

Finally, in *Richerson v. Jones*, 551 F.2d 918 (3rd Cir. 1977), the court held that punitive damages were not available under Title VII, and went on to explain and distinguish its previous holding in *Rosen*:

> "Finally, we are aware that in *Rosen v. Public Service and Gas Co.*, 477 F.2d 90, 96 (3rd Cir. 1973), this Court stated that plaintiffs who were denied pension benefits because of sex discrimination could recover 'compensatory damages' under Title VII. While *Rosen* referred to compensatory, rather than punitive damages, it could be argued, inasmuch as both types of damages are legal in character, that this Court in *Rosen* extended the 'equitable relief' of the statute to forms of legal relief. Such an interpretation or 'extension' is unwarranted. *Rosen* was unquestionably correct in concluding that wrongfully withheld pension benefits could be recovered under Title VII, but as the Supreme Court made clear in *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416-17, 95 S. Ct. 2362, 45 L. Ed. 2d 280 (1975), that recovery is actually a form of equitable restitution rather than a form of legal damages." *Ibid.*, 926-927, n.13.

Thus, the Third Circuit itself has declared that Petitioner's interpretation of *Rosen* is unwarranted.

Other than the three cases cited by Petitioner and discussed above, Respondent's diligent research has revealed no other circuit court decision that even gives the appearance of allowing monetary relief other than back pay, i.e., general compensatory damages. Indeed, every circuit court that has dealt with the precise issue has ruled that such damages are not available under Title VII. *Richerson v. Jones, supra; Pearson v. Western Electric Co., supra.* Also, see, *Garner v. Giarrusso*, 571 F.2d 1330 (5th Cir. 1978), *reh. den.* 575 F.2d 300. Additionally, the question has arisen in the context of whether a Title VII party has the right to jury trial. In *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122 (5th Cir. 1969), the Court held there was no right to jury trial insofar as the relief under Title VII was not in the nature of damages, but rather it is equitable. Likewise, in *Harmon v. May Broadcasting Company*, 583 F.2d 411 (8th Cir. 1978), the court ruled there was no right to jury trial under Title VII on the ground that the remedies available are equitable and not comparable to the damages available in a common law action, citing, *inter alia*, *E.E.O.C. v. Detroit Edison Co.*, 515 F.2d 301, 308-9 (6th Cir. 1975), *vacated on other grounds* 431 U.S. 951 (1977). It is interesting to note that in the pages of *E.E.O.C. v. Detroit Edison Co.* referred to, the Sixth Circuit had observed that compensatory and punitive damages were not available under Title VII.

Thus, the decision of the Sixth Circuit in the instant case is not in conflict with the decisions of any other circuit. Indeed, it is in agreement and harmony with such decisions.

3. The Court of Appeals Has Not Decided a Question of Federal Law Which Deserves Further Elucidation by This Court

At pages 10 and 11 of the Petition, Petitioner somewhat obliquely suggests that this Court should settle an important question of Federal Law, because there is a conflict among the circuits and confusion among the district courts. However, as demonstrated above, there is no conflict among the circuit courts concerning the availability of monetary relief other than back pay in a Title VII case.

The cases cited by the Petitioner at page 10 of the Petition do not demonstrate a *present* state of confusion among the district courts on the issue. In light of the Sixth Circuit decision in the instant case, it is difficult to see how either *Compston v. Borden, Inc.*, 424 F. Supp. 157 (S.D. Ohio 1976) or *Hyland v. Kenner Products Co.*, 13 FEP Cases 1309 (S.D. Ohio 1976) can be the source of any further confusion in the Sixth Circuit. Similarly, *Tooles v. Kellogg Co.*, 336 F. Supp. 14 (D. Neb. 1972) should pose no difficulty in light of *Harmon v. May Broadcasting Co., supra. Curran v. Portland Superintending School Committee*, 435 F. Supp. 1063 (D. Me. 1977) simply joined "the clear majority" in denying compensatory and punitive damages. Also, *Tidwell v. American Oil Co.*, 332 F. Supp. 424 (D. Utah 1971) should pose no source of confusion in light of that court's later clarification in *Jiron v. Sperry Rand Corp.*, 423 F. Supp. 155 (D. Utah 1975), wherein the court rejected claims for compensatory and punitive damages as unavailable under Title VII. The court distinguished the award in *Tidwell* as being in the nature of back pay. Furthermore, since Utah is within the Tenth Circuit, any doubt created by *Tidwell* would seem to be removed by the holding in *Pearson v. Western Electric Co., supra.* Finally, *Humphrey v. Southwestern Portland Cement Co.*, 369 F. Supp. 832 (W.D. Tex. 1973) would seem to be questionable authority at best since it was reversed on the merits, 488 F.2d 691 (5th Cir. 1974) and in light of the Fifth Circuit's observations in *Garner v. Giarrusso, supra.*

That little confusion exists is aptly demonstrated by the oft-cited treatise SCHLEI & GROSSMAN, EMPLOYMENT DISCRIMINATION LAW (1976) wherein it is broadly stated at page 1258, that "neither compensatory nor punitive damages are recoverable under Title VII."

Respondent submits that the near unanimity among all federal courts demonstrates that this Court has already supplied sufficient direction in this area of the law by its decisions in *Curtis v. Loether, supra*; *Albermarle Paper Co. v. Moody, supra*; *Franks v. Bowman Transportation Co., supra; International Brotherhood of Teamsters v. United States, supra*; and *Lorillard v. Pons, supra*; and that further elucidation by this Court is unnecessary.[2]

4. The Decision of the Court of Appeals Does Not Conflict With the Decisions of This Court nor With Decisions of Other Courts of Appeals As to Whether Petitioner Was a Prevailing Party

The Sixth Circuit held that "in order to be a 'prevailing party,' a plaintiff must have been entitled to some form of relief at the time suit was brought" (Appendix at p. A20). Petitioner argues that such a holding conflicts

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2. Petitioner argues that the purposes of the Act, will be frustrated by the "constricted inflexible standard" of relief adopted by the Sixth Circuit (Petition, p. 10). It is a highly novel—though incredible—argument that equitable remedies constitute a "constricted inflexible standard."

Additionally, Petitioner makes a desperate plea by arguing that she has been injured but is left without a remedy (Petition p. 11). However, that is not what the Sixth Circuit held. The court's holding was that if Petitioner was injured, wherever her remedy may be, it was not within Title VII.

with this Court's holding in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). However, it is clear, as Petitioner admits, that *McDonnell Douglas* set forth those elements which a plaintiff must show in order to make out a *violation* of Title VII. That is, *McDonnell Douglas* was not concerned with defining "prevailing party." Respondent admits that the central focus of Title VII litigation is whether or not an employer is treating some employees less favorably than other employees because of, *inter alia*, sex. However, Respondent is unaware of any court ruling that proof of a violation in and of itself establishes that a plaintiff is entitled to back pay, reinstatement, injunction, or any other relief permissible under the Act. As noted by the Sixth Circuit and numerous other courts, there are instances where certain types of relief are not appropriate and it is up to the Title VII plaintiff to show just what relief should be granted.

In this regard, Petitioner's citation of *Kober v. Westinghouse Electric Corp.*, 480 F.2d 240 (3rd Cir. 1973) is irrelevant. The plaintiff in *Kober* was not declared a prevailing party in either the statutory or any other sense. In fact, the phrase "prevailing party" is nowhere to be found in *Kober* at all. Thus, the Petitioner has failed to cite even a single case which conflicts with the Sixth Circuit definition of a "prevailing party."

Moreover, the Sixth Circuit's ruling is in accord with numerous decisions which hold that a plaintiff is a prevailing party if he succeeds on the merits *and* obtains some type of relief or at least causes the removal or end to discriminatory practices. E.g., *Taylor v. Safeway Stores, Inc.*, 524 F.2d 263, 273 (10th Cir. 1975); *Rosenfeld v. Southern Pac. Co.*, 519 F.2d 527, 529 (9th Cir. 1975); also see, *Christianburg Garment Co. v. E.E.O.C.*, 434 U.S. 413 (1978); and *Lea v. Cone Mills Corporation*, 438 F.2d 86, 88 (4th

Cir. 1971). In this same regard, it is interesting to note that in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51, n.14 (1974), this Court observed that where relief is not available under Title VII, an employee has no need to file a Title VII lawsuit.[3]

5. The Decision of the Court of Appeals Does Not Conflict With the Decisions of This Court Regarding the Availability of Declaratory Relief Under Title 28 United States Code §§2201 and 2202

The Petitioner argues that the Sixth Circuit erred in ignoring the availability of declaratory relief when it ruled that Petitioner was not a "prevailing party." Again, the cases cited by the Petitioner are of little value, if any. On the other hand, this Court has previously ruled that declaratory relief under 28 U.S.C. §§2201 and 2202 should not be granted where a special statutory proceeding, like the Civil Rights Act, has been provided. *Katzenbach v. McClung*, 379 U.S. 294, 296 (1964). Also see, Notes of the Advisory Committee on Federal Rules of Civil Procedure 57. Several district courts have applied *Katzenbach* in denying such relief in Title VII actions. E.g., *Budinsky v. Corning Glass Works*, 425 F. Supp. 786, 789 (W.D. Pa. 1977).

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3. Petitioner asserts that relief is available under the Federal Declaratory Judgment Act (Petition, p. 12, n.6). Respondent's reply thereto follows below in Reason 5 for Denying the Writ. Additionally, Petitioner asserts that she is entitled to an injunction ordering the expungement of the 18 unsatisfactory performance reviews from her personnel file. Such is doubtful for several reasons. First, neither of the lower courts found that the reviews constituted retaliation or otherwise were violations of Title VII. The trial court found discrimination based solely on a difference in working conditions. Secondly, as noted above in note 1, the trial court did not connect any of Respondent's conduct with discriminatory motive. Finally, the Petitioner did not appeal the trial court's failure to grant such an injunction, and in fact, until now, Petitioner has not argued for such relief.

Furthermore, Respondent submits that it would be improvident to grant a writ of certiorari on this ground asserted by Petitioner for two other reasons:

(1) The Petitioner did not appeal the failure of the trial court to grant such relief and, therefore, she should not be permitted to argue that now; and

(2) The admitted facts show that such relief would serve no useful purpose, there being no *existing* controversy between the parties so as to cause uncertainty with respect to their rights.

6. The Decision of the Court of Appeals Does Not Conflict With the Decisions of This Court Regarding the Imposition of Costs on Appeal

Petitioner argues that the Sixth Circuit's comments regarding "fruitless litigation" are in conflict with this Court's recent ruling in *Christianburg Garment Co. v. E.E.O.C.*, 434 U.S. 413 (1978). However, Petitioner's reliance on *Christianburg Garment Co.* is misplaced. In that case, this Court held that *attorney fees* could not be awarded in favor of defendants who prevailed in Title VII ligitation unless the plaintiff's action was frivolous, in bad faith, etc. On the other hand, the Sixth Circuit's ruling did not award attorney fees *against Petitioner*—it refused to award attorney fees *in her favor*. The Sixth Circuit correctly observed that the practice of awarding attorney fees to plaintiffs who could show a violation of the Act, but who were not entitled to relief, would only encourage "fruitless litigation."

Petitioner implies that the Sixth Circuit taxed costs against her because her litigation was "fruitless." However, that was not the holding of the Sixth Circuit. As admitted by Petitioner at page 7 of her petition, the costs

of appeal (vis-a-vis, the entire case) were taxed to Petitioner pursuant to Rule 39(a) Federal Rules of Appellate Procedure. That rule states that the costs of *appeal* are taxed against the appellee where a judgment is reversed.

Petitioner further argues that the taxing of appeal costs against Title VII plaintiffs who fail to obtain any form of relief will erode established federal policy favoring private enforcement. However, it is difficult to see how such a procedure will discourage plaintiffs from bringing suit in the first instance. The costs are assessed only if the plaintiff loses on appeal. Such a procedure is no more a discouragement to Title VII plaintiffs than to any other type of plaintiff. One might as well argue that since a plaintiff's judgment might be reversed on appeal, one is discouraged from filing any type of lawsuit, and therefore, we should abolish appellate courts altogether in order to encourage plaintiffs.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit should be denied.

Respectfully submitted,

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